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plaintiff's negligence will not excuse him."[11] This statement glosses over the requirement that the defendant, and the defendant only, must have had the last clear chance to entitle the plaintiff to recover. This requirement is strongly insisted upon by Salmond,[12] and Pollock,[13] and quite properly. A failure to observe this stringent requirement has apparently led the court into error in the principal case.

RECENT DECLARATORY JUDGMENTS

The current law reports in England and elsewhere disclose a number of cases in which declaratory judgments have been rendered under circumstances in which the majority of our courts would, under present practice, have been unable generally to grant any relief. The useful results achieved in these cases seem to warrant a brief comment upon them.

Perhaps the most interesting is an English case involving a request for a declaration of privilege by the plaintiffs who claimed that a certain sum payable by the British Admiralty in respect of a requisitioned ship lost while in Government service belonged wholly to them as owners of the ship and that the defendants, the charterers, had no right to share in it.[1] The ship had been let by the plaintiffs to the defendant charterers in 1914 for a period of eight years, under a condition that if she was lost hire was then to cease from the day of her loss. In 1917 she was requisitioned by the Admiralty under terms that if she were lost by war risks, compensation would be made on her ascertained value. Shortly afterwards she was sunk by the enemy. The defendants notified the Admiralty that they had an interest in any sums payable, whereupon the plaintiffs brought this action for a declaration that the defendants had "no right" to any compensation and that the sum payable belonged to the plaintiffs exclusively. It will be observed that the plaintiffs here had no "cause of action" against the defendants. They merely asserted the defendants' "no right" and their own freedom from a duty to share with the defendants the Admiralty award (i. e. a privilege). Much the same problem was involved in the celebrated case of *Guaranty Trust Co. v.*

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[11] *Ibid.*, 638.

[12] Salmond, *Torts* (4th ed. 1916) 44, 45.

[13] Pollock, *Law of Torts* (10th ed. 1916) 489.

[1] *London-American Maritime Trading Co. v. Rio de Janeiro T. L. & P. Co.* [1917] 2 K. B. 611. Indirectly of course, the plaintiff asserts a right to the money and to all of it, but this right is against the Government and not against the defendant. The plaintiff also asserts the defendant's no-right against the Government as well as his future no-right against the plaintiff after the plaintiff collects the money from the Government. The suit was doubtless brought incidentally to advise the Admiralty as to its duties, although not *res judicata* as to it.

Hannay[2] in which the Guaranty Trust Co. brought an action for a declaration "that the plaintiffs are not liable to repay to the defendants any sums paid to them" by the defendants in respect of certain bills of exchange. After much apparent doubt, the Court of Appeal decided that though the "cause of action" vested in the defendant, they were empowered, under the rule authorizing them to "make binding declarations of right whether any consequential relief is or could be claimed or not," to make the declaration sought, though it was in fact a declaration of a "privilege," and not of a "right."[3] The London-American case illustrates the same legal relation of the parties. Except in New Jersey,[4] Wisconsin[4a] and Michigan,[5] our courts have not yet the power to perform the useful function undertaken by the English courts in the two cases mentioned, for we have not adequately recognized that *uncertainty* in one's legal relations, like a cloud on title, constitutes a disturbance of the social equilibrium which it is properly the function of the judicial machinery to correct and remove.

In another case arising out of the requisitioning of a chartered vessel by the British Admiralty,[6] the declaration was sought by the charterers, who claimed that the charter-party was not terminated by the requisitioning but remained in force and hence that they alone, and not the defendants, the owners, were entitled to receive the Admiralty hire. Here again it may be said that the plaintiffs had no "cause of action," as that term is usually understood, but the declaration, again one of privilege, was made by the court, with reference to a referee, at the defendant's option, to determine the latter's title as owner to share in the hire because of increased risk.

Two other cases illustrate the valuable function by way of preventive relief involved in the power of a court to construe a contract *before* it is broken and a claim for damages has arisen, or to determine whether a particular act constitutes a breach. In the first, the plaintiffs chartered a vessel to the defendants under a charter which provided for her employment between "safe" ports.[7] In February, 1915, after the German war-zone decree, the defendants ordered the steamer to Newcastle-on-Tyne to load. The plaintiffs thereupon sought a declaration that Newcastle was not a "safe" port within the meaning of the charter-party, and that the defendants by ordering her to that port had committed a breach of the charter-party which privileged the plaintiffs to withdraw the ship from the defendants' service. Before acting on their own interpretation of the defendants' act and incurring heavy damages if they proved to be wrong—which, in default of an injunction, would have been necessary to present the case to an American court—the plaintiffs sought and obtained a judicial declaration of their rights. The court, in holding that Newcastle was a "safe" port within the meaning of the charter-party, performed the useful function of declaring a *fact,* thus determining the only issue in the case. Whether this is done by the court alone, or referred to a jury, it is submitted that such valuable opportunity for relief, *before* serious injury or damages have arisen, should no longer be denied to American courts.

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[2] *Guaranty Trust Co. v. Hannay* (C. A.) [1915] 2 K. B. 536; (C. A.) [1918] 2 K. B. 623.

[3] See (1918) 28 YALE LAW JOURNAL, 9.

[4] Chancery Act, 1915, Public Laws 1915, ch. 116, sec. 7, p. 185.

[4a] Wisconsin, Act of May 27, 1919, Laws of 1919, ch. 242, p. 253.

[5] Act printed in (1919) 17 MICH. L. REV. 689.

[6] *Elliott Steam Tug Co. (Ltd.) v. Chas. Duncan & Sons, Ltd.* (1918, K. B.) 34 Times L. R. 583. See also note 1, *supra*.

[7] *Palace Shipping Co., Ltd. v. Gans Steamship Line* [1916] 1 K. B. 138.

The other case, which arose in New Jersey, involved the construction of several contracts for future performance, between a water company and a municipality.[8] Company A had under contract supplied the city of Bayonne with water, and A in turn had certain contracts with the defendant company for such supply. A subsequently assigned its contracts with the defendant to the city. The defendant thereupon informed the city that it would no longer supply water to it, claiming that it was relieved from any further obligations by the assignment. The city thereupon sued for an injunction restraining defendant from ceasing to supply water to it, and also for a declaration of the future rights of the plaintiff and the defendant under several of the assigned contracts. The court not only issued the injunction, but also the declaration as to their respective rights and duties to be enjoyed and performed in the future. Such determination of future legal relations would not have been possible in most of our states.[9]

In another case a Government war order, prohibiting the building of any but standard ships, prevented the defendants from proceeding with a contract to build two special ships for the plaintiffs. The plaintiffs, after the armistice, brought an action for a declaration that the contracts were still subsisting and that the defendants were bound to perform. They did not allege a breach nor did they ask damages. The declaration sought was denied on the ground that the Government's interference had so changed the circumstances that the doctrine of frustration applied.[10]

The combination of a request for an injunction with one for a declaration of rights is quite customary in England and Scotland, and serves a useful purpose. The usual bill for injunction is granted under restricted technical conditions only; should it be dismissed, the plaintiff obtains, in America, no adjudication of his rights and must either withdraw his claim or begin a new action at law, while submitting to an accrual of continuing damages. Should the action at law be successful, the defendant will have to foot a bill for damages which would have been greatly diminished had he known earlier that he was a wrongdoer. Where, however, as in England, the bill for injunction is combined with a request for a declaration of rights, the denial of the injunction has usually no such unfortunate results, for the court may still make the declaration sought and thus enable the parties to know their respective rights and duties in the premises.[11] Such combined requests are resorted to particularly where the grant of the injunction seems doubtful, as is most often the case. A member of a club recently sought an injunction to restrain defendants from suspending her from membership, plus a declaration that the plaintiff was a member of the club.[12]

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[8] *Mayor & Council of City of Bayonne v. East Jersey Water Co.* (1919, N. J. Eq.) 108 Atl. 121.

[9] Florida enacted a statute in May, 1919, authorizing its courts to declare legal relations under any written instrument.

[10] *Woodfield Steam Shipping Co. v. Thompson* (1919, C. A.) 36 Times L. R. 43.

In an interesting case arising in New Jersey the plaintiff and the defendant were neighboring owners of land under various conveyances, each party claiming a right of way over the land of the other.[13] The plaintiff brought a bill to have her own land determined to be free from the claim of her neighbor to a right of way, and her own claim to such right over her neighbor's land confirmed. It was moved to dismiss the bill for lack of jurisdiction in equity to grant relief. There had been no attempt to use the right of way, hence there was no ground for injunction, or for trespass at law; nor was there any dispossession, so that ejectment could not be maintained. The ordinary conditions for a bill of peace or a bill *quia timet* were also absent, though the relief sought presents certain analogies to a bill of peace. The New Jersey court found the necessary authority to declare the rights of the parties in the Chancery Act of 1915, authorizing declaratory judgments.[14] Such determination of conflicting claims to rights in land might also have been made under a statute in Connecticut,[15] but in most states it would doubtless have been difficult under the facts.

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[11] See *Islington Vestry v. Hornsey U. C.* (C. A.) [1900] 1 Ch. 695; *Llandudno U. D. C. v. Woods* [1899] 2 Ch. 705.

[12] *Young v. Ladies Imperial Club, Ltd.* (1919, K. B.) 36 Times L. R. 70. (Both requests were denied on the merits.) See also *Cassell v. Inglis* [1916] 2 Ch. 211; *Weinberger v. Inglis* (1917, Ch.) 118 L. T. 208.

[13] *Renwick v. Hay* (1919, N. J. Eq.) 106 Atl. 547. See also *Sharon v. Tucker* (1892) 144 U. S. 533, 12 Sup. Ct. 720.

[14] Note 4, *supra*: "Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested."

[15] Public Acts, 1915, ch. 174, sec. 1. "An action may be brought by any person claiming . . . an interest in . . . real or personal property . . . against any person who may claim . . . any interest . . . adverse to the

In a novel case recently decided in England, the declaration sought was denied. By a contract made between the plaintiffs and the Secretary of War, the latter hired from the plaintiffs a steam engine and hay press on condition that the engine should be used only for the purpose of working the press. It being alleged that the engine had been used for other than the specified purpose, the plaintiffs sought a declaration against the new Secretary of War that they were entitled to compensation for the improper use of the engine and that the contract be construed.[16] It was held that inasmuch as no action could possibly lie against the Secretary of War on the contract, no declaration against him would be made. An old statutory remedy having been allowed to lapse, it was intimated that the petition of right was the only available remedy, although declarations have been made against the Attorney General even in the absence of a petition of right.[17] On a claim for money compensation, however, the declaration would hardly be permitted to take the place of a petition of right.

New Jersey, Florida, Wisconsin, and Michigan now authorize their courts, with more or less latitude, to render declaratory judgments and the Bar Associations of Connecticut and of California have recently recommended legislation in their respective states giving this power to the courts. Cases are constantly arising in jurisdictions where the declaratory judgment is authorized illustrating the valuable results achieved by this useful instrument of preventive justice, and it is to be hoped that the other states of this country and the federal government will not delay long in availing themselves of its benefits.

E. M. B.

OPERATIVE FACTS IN GIFT OF LAND

A frequent and often-times difficult question arises whether there has been a proper delivery of a deed to create a gift. Three recent Illinois decisions relate to this problem under different situations. In the case of *Moore v. Downing* (1919, Ill.) 124 N. E. 557, an uncle executed deeds which he delivered to a party with written instructions

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plaintiff . . . for the purpose of determining such adverse . . . interest . . . and to clear up all doubts and disputes, and to quiet and settle the title to the same." See *Ackerman v. Union & New Haven Trust Co.* (1915) 90 Conn. 63, 96 Atl. 149; (1917) 91 Conn. 500, 506, 100 Atl. 22.

[16] *Hosier Bros. v. Earl of Derby* (C. A.) [1918] 2 K. B. 671.

[17] *Dyson v. Atty. Gen.* [1911] 1 K. B. 410; (C. A.) [1912] 1 Ch. 158, 167. *Burghes v. Atty. Gen.* [1911] 2 Ch. 139, 155; (C. A.) [1912] 1 Ch. 173. These cases involved requests for declarations that plaintiffs were exempt from a requirement to make certain returns on forms submitted by the commissioner of internal revenue.